The learned deputy contended that the proviso above-mentioned applies only where the Public Prosecutor or persons acting under him have custody of the prosecution, and does not apply to private prosecutions in a non-seizable offence, to which category the present offence belongs.

It will be pertinent to examine at this stage section 380 of the Criminal Procedure Code. Section 380 reads: —

"Notwithstanding anything in this Chapter contained —

(i) ...

(ii) In summary non-seizable cases in the Court of a Magistrate —

(a) The Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;

(b) ...

(c) Any private person may appear in person or by advocate or, in the State of Trengganu, by a pleader and prosecute for an offence against his own person or property."

One would then be faced with the absurd situation, if the learned deputy is correct in his submission, of the Public Prosecutor (or those appearing on his behalf), having to supply the defendant with a copy of the medical report 10 clear days before the trial should he or those deputed by him choose to conduct the prosecution, whilst a private prosecutor need not do so.

This absurd situation grows in magnitude when one considers the obvious purpose of section 399 of the Criminal Procedure Code.

In the case of *Wong Kok Keong* v. *Regina*[1] Spenser Wilkinson J. held that the effect of section 427(i) of the Criminal Procedure Code (S.S.) (which is identical in terms with our section 399(i)) is to make certain documents evidence of the truth of their contents, which would otherwise not be evidence at all, and that therefore the provisions of that sub-section are provisions relating to evidence rather than to procedure. With this conclusion I would with respect concur.

Failure to comply with the sub-section would only be curable, the learned judge goes on, by virtue of section 488 (Straits Settlements Criminal Procedure Code (Cap. 21)), (our section 422, Criminal Procedure Code (Cap. 6)) if, without the inadmissible report there was evidence sufficient to justify the finding of the court below.

To accept the learned deputy's view is to accept a double standard whereby what is inadmissible evidence where the Public Prosecutor prosecutes becomes admissible evidence in the hands of a private prosecutor. Moreover it is reasonable to assume that in requiring the Public Prosecutor to give no less than ten days notice to the accused where he intends to give in evidence such report, it is the intention of the legislature that such notice would enable the accused to opt between allowing such evidence to be admitted or to require the maker of such report to appear in person under section 399(i)(b). It would follow that not to require private prosecutors to give notice of a similar intention would rob an accused person of such option, a result which would surely be unjust.

This is, in my judgment, a case where this court must modify the language of the law to meet what must be the intention of the legislature. I need hardly add that there is ample authority to support this course. As Denning L.J. said in *Seaford Court Estates, Ltd.* v. *Asher*[2] —

"It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges (Sir Roger Manwood C.B. and the other barons of the Exchequer) in *Heydon's* Case and it is the safest guide to-day."

Both the medical certificates admitted in this case are therefore in my opinion inadmissible, and without these there is insufficient evidence to support the finding of the lower court.

Accordingly, the appeal is allowed. The order binding over the appellant is set aside, and sum ordered to be paid as compensation, if paid, should be refunded to the appellant.

Appeal allowed.

Solicitor: *A. S. C. Hoe.*

PHIONG KHON v. CHONH CHAI FAH

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Lee Hun Hoe J.) May 29, 1970]

[Kuching — Federal Court Civil Appeal No. X.8 of 1969]

Chinese Law and Custom — Extent to which recognised in Sarawak — Validity of Chinese marriage — Document transferring interest in land — Whether oral evidence admissible to explain document — Application of Chinese customary law to succession on intestacy — Chinese Marriage Ordinance (Cap. 74) — Administration of Estates Ordinance (Cap. 80) — Evidence Ordinance (Cap. 57), s. 94.

Evidence — Admission of extrinsic evidence to construe and interpret document in the light of surrounding circumstances — Evidence Ordinance (Cap. 57), s. 94.

Contract — Intention to create legal relationship — Family arrangement.

In this case one Jong Nyit Siong (f) died having certain property including the land in dispute. By her first marriage she had a daughter and a son, the respondent herein. After the death of her husband, she set up home with the appellant until her death. Her union with the appellant was not registered. The respondent had executed a document which the appellant alleged was a transfer of the land in dispute to him, but which the respondent said was intended to give only a life interest in the land.

Held, dismissing the appeal: (1) extrinsic evidence was admissible in this case to explain or interpret the written document;

(2) on the facts the appellant had not discharged the onus of showing that the document was a transfer of land to him.

Observations on the application of Chinese customary law in Sarawak. A Chinese marriage contract in Sarawak

is not valid unless registered under the Chinese Marriage Ordinance. The Chinese customary law applies on intestacy in a Chinese estate in Sarawak.

Cases referred to:-

(1) *Ismail Mussajee Mookerdam* v. *Hafiz Boo*, I.L.R. 33 Cal. 773; 10 C.W.N. 570; 33 I.A. 186, P.C.

(2) *Jones* v. *Padavatton* [1969] 1 W.L.R. 328.

(3) *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 1 W.L.R. 339, 356.

(4) *Chan Bee Neo & Ors.* v. *Ee Siok Choo* [1947]. S.C.R. 1.

(5) *Tay Sok Ann* v. *Tay Sok Hiong & Anor.* [1955] S.C.R. 17, 20.

FEDERAL COURT.

Mathew Chan for the appellant/plaintiff.

Stephen Yong for the respondent/defendant.

Cur. Adv. Vult.

Azmi L.P.: I have had the opportunity of reading the judgment of my brother Lee Hun Hoe J. and agree that the appeal should be dismissed with costs.

Ismail Khan C.J. (Borneo): I have had the advantage of reading the judgment of my brother Lee Hun Hoe J. and agree that the appeal should be dismissed with costs.

Lee Hun Hoe J.: This is an appeal against the decision of the High Court sitting at Kuching concerning a piece of land. Jong Nyit Siong (f) died on 1st February, 1967 leaving certain property including the land in dispute. By her first marriage she had a daughter and a son, the respondent in this case. After the death of her husband she lived for some years at the 18th Mile, Penrissen Road, Kuching, with a man named Tian Shung. She eventually left him and moved to the 8th Mile along the same road, where, shortly afterwards, she set up home with appellant until her death. Neither her union with Tian Shung nor with appellant constituted a proper marriage. There is no evidence that in either case the marriage was registered in accordance with section 4 of the Chinese Marriage Ordinance (Cap. 74). Unless such a marriage is registered after the commencement of the Ordinance it shall not be regarded as valid.

The land in question is at the 8th Mile, Penrissen Road, acquired by the deceased in 1953. The original holding was a one-half undivided share, which was partitioned on 6th June, 1957. It is 8.61 acres in area, originally severed out of virgin jungle by the appellant and the deceased which was transformed by their labours into a profitable pepper garden. They had their dwelling on it. The registered owner of the land was the deceased. But the title had all the time been in the respondent's possession.

The deceased having died intestate the conflicting claim of the appellant and the respondent to this parcel of land came up before the village elders for settlement. An agreement drafted in simple Chinese by the respondent, was copied by one Chai Jui Tze and the fair copy signed by the parties and four witnesses on 7th March, 1967. That a dispute subsequently arose as to its construction is not surprising. The agreement which was prepared by a layman using a language foreign to the common law could hardly be conducive to clarity or precision. An agreed English translation of the agreement was put in.

The appellant believed himself entitled under the agreement to absolute ownership of a demarcated portion of two acres. The respondent said that he agreed only to let the appellant enjoy the rents and profits of such area during his lifetime. He did not agree to the appellant having absolute ownership so that the latter might be able to dispose of it by will. The respondent has not resiled from his word.

The learned judge dismissed the appellant's claim, holding as a fact that on the evidence what the respondent intended to be given was only a life interest to an agreed portion of the land. The appellant contended that the learned judge erred in the view he took regarding the intention of the parties.

By paragraph 1 of the statement of claim the appellant claimed to have married deceased according to Chinese custom. In his defence the respondent denied this and put the appellant to strict proof. Although the villagers might have looked upon the appellant and the deceased as husband and wife the law does not regard their union as valid as it was not registered under the provisions of section 4 of the Chinese Marriage Ordinance (Cap. 74). The first two subsections read: —

"4. (1) Every Chinese marriage contracted within the colony shall be registered within one month with the Registrar of the District in which the husband resides.

(2) No such marriage shall be valid unless so registered: Provided that a Resident's Court may, on the application of either party or of any person interested, declare the marriage is valid if satisfied that it is otherwise valid by established Chinese law or custom."

The appellant has never established the validity of his marriage with the deceased. Therefore he has no legal claim to the deceased's estate which he would have as of right if he was her lawful husband.

By paragraph 4 of his statement of claim the appellant contended that by an agreement the respondent agreed to transfer two acres of the land to him. In his defence the respondent admitted executing an agreement but denied that there was an agreement of transfer. He said what was intended to be given to the appellant was a life interest in a portion of the land.

The appellant argued that the intention must be ascertained from the document itself and that the document must be looked at as a whole. He submitted that the learned judge erred in going outside the document. He referred to section 94 of the Sarawak Evidence Ordinance (Cap. 54). On the other hand the respondent submitted that the learned judge was perfectly right to hear extrinsic evidence because of the nature of the document.

Section 94 reads: —

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement

shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its items: Provided that —

.....

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts."

First, I would observe that as far as I know the present agreement is not one required by law to be reduced to the form of a document. Secondly, where the document does not constitute the contract between the parties, oral evidence is not excluded. Therefore there was nothing to prevent the learned judge from hearing extrinsic evidence. The Sarawak Evidence Ordinance was an adaptation of the Indian Evidence Act, 1872 subject to certain modifications to suit local conditions. Section 94 is substantially the same as section 92 of the Indian Evidence Act, 1872. Proviso (f) is word for word the same as proviso (6) of the Act. *Monir* on the Principles and Digest of the Law of Evidence, 4th Edition, page 576, under the heading of admissibility of surrounding circumstances to explain or interpret written contracts, grants and instruments other than wills has this passage: —

"Where a deed of transfer raises an ambiguity as to the nature of the interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed. If the question is whether the lease is perpetual or not, evidence as the surrounding circumstances is admissible, because it explains what, standing alone, is incapable of explanation — whether the grant is only to the person named in the lease or to him and his heirs. Where the document creating the tenancy is equivocal or ambiguous in its terms, the attendant circumstances must be taken into consideration."

Under the head of court's power to construe and interpret a document in the light of surrounding circumstances is not affected by the rule in section 92 the author observes: —

"Section 92, however, merely prescribes a rule of evidence; it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. Thus, the Privy Council (*Ismail Mussajee Mookerdam* v. *Hafiz Boo*[1]) held a document which purported to be a deed of sale, to be a deed of gift, on a consideration of the circumstances under which it came to be executed."

The agreement seems to be concerned with various matters. It is extremely vague and ambiguous. Without hearing extrinsic evidence it is impossible to know what are the arrangements set out in the document. The agreement is silent as to the exact portion to be given to appellant who mentioned two acres. It is also silent as to whether the promise to transfer is absolute or for life only. It is possible that in the absence of the mention of a price for the land this suggests the promise of a gift of a portion of land. The question is whether it is to be transferred absolutely or for the appellant's lifetime. Nothing is mentioned in the agreement about the price of the land per acre. Chai Jui Tze (P.W. 3) mentioned that the land was worth $4,000 per acre.

The agreement recited that in order "to deal with the question of distributing land" the parties made certain decisions which consisted of eight clauses. Clause 1 defines in a complicated fashion the portion of land to be demarcated. It included pepper vines and pepper which was to be transferred to the appellant to manage on the following conditions. Clauses 2 to 8 then follow. Clause 2 mentions that before the end of August 1967 the appellant shall pay the respondent $1,000. Among other things clause 3 states that during the years, 1968, 1969 and 1970 the appellant shall deliver 2 pikuls of dry white pepper to the respondent. Clause 4 deals with the dwelling house permitting the appellant to live there for two years so long as he remained single. Clause 5 deals with the furniture in the dwelling house. So long as he lives in the house he would be responsible to look after the furniture. If he leaves he could only take what belongs to him. Clause 6 makes clear that the appellant is to be responsible for expenses incurred for survey fee, transfer fee and other formalities in respect of the portion of the land demarcated. Clause 7 says the original Chinese agreement shall be the correct version of the agreement. Lastly clause 8 forbids the appellant marrying in the dwelling house.

There is evidence indicating that the land was to be given to the appellant to enjoy during his lifetime only. Chai Jui Tze (P.W. 3) who copied the draft prepared by the respondent and who was a signatory to the agreement stated in evidence in chief that "Plaintiff told Capitan he was over 60 and he wanted land to plant pepper until his death." Another signatory to the agreement Kong Tze Leong (P.W. 4) in answer to the learned judge stated that "Negotiation went on for 3 hours. 2 acres transferred to plaintiff to grow pepper during his life and then to be buried there." On being cross-examined he seemed to "agree plaintiff had right to enjoy even until his death and be buried there. I mean buried in cemetery there but not on the land itself. That is what plaintiff asked for." On the evidence the learned judge was right to reach this conclusion when he said "I hold as fact on the evidence that the interest intended to be given to the plaintiff was a life interest in the land and the right to its use at his discretion subject to that interest."

For myself I consider that the learned judge was right to dismiss the claim. It was the appellant who pleaded the agreement. The respondent denied it was legally binding on him — not at least, in the sense contended by the appellant. This plainly raises the issue whether the agreement was binding. It is the appellant who relied on the agreement therefore the onus of proving the affirmative rested on him. In my judgment he failed to do so. He had to prove consideration but there was none. This point was raised and not objected to before the learned judge who did not rely on this to reach his conclusion. The sum of $1,000 under clause 2 had nothing to do with the land. The appellant himself clearly stated "The $1,000 I wanted to pay to defendant as he had spent $1,000 for burial expenses. This is the equal of 6 pikuls of white pepper. It was paid because the defendant had spent money on making the grave." Again Chai Jui Tze (P.W. 3) testified that "The $1,000 in clause 2 was that which defendant paid towards funeral expenses." Regarding the pepper in clause 3 the appellant explained in cross-examination that "The pepper to be delivered in 1968, 1969 and 1970 was to allow defendant to make up his mother's grave."

Moreover, looking broadly at the arrangements set out in the document, the terms seem so vague and uncertain that it must be seriously doubted whether there was any intention to create a legal relationship thereby. See *Jones* v. *Padavatton*[2]. As Lane J. said recently in *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers*[3], that "without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour." It is true that the defence does not plead this specifically but by paragraph 3 of defence the respondent does deny that there was an agreement of transfer. Nevertheless the onus of showing that the agreement was binding rested with the appellant.

Another aspect of the agreement may have to be looked into. To what extent would the existence of the deceased's daughter who was not a party to the agreement affect the agreement. This point was not raised by the defence for a good reason. That is the existence of the deceased's daughter does not affect the agreement in any way. The deceased's daughter is married to one Lai Yin Seng. I think both counsel are aware of the extent to which Chinese customary law is applicable in Sarawak. This has been expounded with lucidity by Dr. Hedges, then Chief Justice of Borneo in *Chan Bee Neo & Ors.* v. *Ee Siok Choo*[4] where the appellant unsuccessfully challenged the validity of a will as being contrary to Chinese customary law. In that case it was laid down that the court will apply Chinese customary law where the custom in question is expressly regulated by a Sarawak Ordinance or by rules made under an Ordinance, or where the custom is recognised, either expressly or by necessary implication, in a Sarawak Ordinance. As regards the law of inheritance, the Chinese customary law of succession on intestacy has long been recognised by Sarawak courts. Thus section 17 of the Administration of Estates Ordinance (Cap. 80) (which was omitted from the 1958 revised edition of the Laws of Sarawak but is still in force and to be found in Vol. III of the 1947 revised edition of the Laws of Sarawak) charges the administrator to distribute the estates among the heirs of the deceased "in the shares to which they are entitled by recognised law or custom." By implication this has been accepted as including Chinese customary law. The underlying principle of Chinese customary law of intestate succession would seem to be that on the death of the parent the persons entitled to the family property are all the sons and the male descendants, regardless of whether they are sons of the primary or secondary wives. Where the deceased left a widow and daughters then those sons who share the property would be responsible for the support of their mother until her death, and sisters until their marriage or earlier death. I find support in the case of *Tay Sok Ann* v. *Tay Sok Hiong & Anor.*[5] where the validity of a will was contested. There Blagden J. observed: —

"In my view, as this is a Chinese Estate, any proved or accepted Chinese custom in Sarawak should prevail over English law. This is apparent from the proviso to section 2 of the Application of Laws Ordinance (No. 27 of 1949). From the evidence available to the Court I am satisfied that there is accepted Chinese custom in Sarawak relating to the descent of property on an intestacy, and that custom is that the property of the deceased is divided equally between the sons, who become responsible for the support of their mother until her death and their sisters until their marriage or earlier death."

This has always been recognised as the Chinese customary law of intestacy in Sarawak. It can create a problem where a man dies leaving a wife and daughters and brothers. The Sarawak Administration of Estates Ordinance was enacted in 1933 and if I may say so is clearly archiac and unsatisfactory to present day conditions. The Probate and Administration Ordinance (Cap. 109) of Sabah is more progressive. Again in Sabah under the Intestate Succession Ordinance, 1960 certain rules of distribution are laid down. Thus if a person died intestate leaving a wife and children, the wife is entitled as of right to one-third of the estate and the other two-thirds of the estate is to be shared equally among the children.

In praying for specific performance the appellant is seeking a discretionary remedy. He has now moved to another house which he has built on the portion of land he believed to be transferred to him absolutely. My sympathy is with the appellant. But I do not have the same advantage as the learned judge in assessing his credibility. Of the appellant the learned judge has this to say,

"The plaintiff appears to be prepared to say that which suits his case. For example his evidence as to the articles removed from the land: he says first that he did not know they were not mentioned in the agreement (para. 5) which only allowed him to remove certain specific things, secondly that they were bought by him and finally he admitted that they were for the most part bought by the deceased. He was clearly not entitled to remove them and to do so was a breach of the agreement."

In my judgment the learned judge was right on the particular facts of the case to hold that the respondent intended to give a portion of the land for the appellant's use during his lifetime. The respondent has not resiled from his word. In fact he has not interfered with the appellant's enjoyment of the land. The respondent's counsel has indicated that he will undertake to draft the necessary papers to ensure that the appellant's right is protected. Since this undertaking has been given, it is not necessary to add a recital to the order which the court may make that the respondent conceded that under the agreement the appellant was entitled to a life interest in that portion of the land as demarcated.

For reasons given the appeal is dismissed with costs.

Appeal dismissed.

E. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Azmi L.P., Suffian Ag. C.J. (Malaya) and Gill F.J.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 99 of 1969]

Income Tax — "Trade" or "business" — Whether isolated sale of land is trade or business — Transaction an ad-